

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
TW Telecom Inc. Petition for Declaratory)	WC Docket No. 11-119
Ruling Regarding Direct IP-to-IP)	
Interconnection, Pursuant to Section 251(c)(2))	
of the Communications Act)	

**REPLY COMMENTS OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

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SUMMARY

The Federal Communications Commission (“FCC” or “Commission”) should dismiss the unpersuasive arguments raised by those opposing the petition filed by tw telecom inc. (“TWTC”) regarding Internet Protocol (“IP”)-to-IP interconnection. Contrary to views posited in some of the original comments, TWTC’s Petition is entirely consistent with the findings of the United States Court of Appeals for the Eighth Circuit and with the FCC’s National Broadband Plan. Furthermore, the FCC should not rely on market-based solutions to achieve interconnection because such an approach would unduly favor incumbents and would dilute the benefits that could otherwise occur for consumers. The FCC should grant TWTC’s Petition in a timely manner.

Rate Counsel also urges the Commission, as a separate but related matter, to determine unambiguously that fixed, interconnected Voice over Internet Protocol (“VoIP”) is a telecommunications service.

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I. INTRODUCTION

The New Jersey Division of Rate Counsel (“Rate Counsel”) hereby submits reply comments to the Federal Communications Commission (“FCC” or “Commission”) regarding the petition filed on June 30, 2011, by tw telecom inc. (“TWTC”) for a declaratory ruling that it has the right under section 251(c)(2) of the Communications Act, as amended, for Internet protocol (“IP”)-to-IP interconnection with incumbent local exchange carriers (“ILEC”) for certain IP-

based services (“Petition”).¹ ILECs are among those that oppose the Petition,² and competitive local exchange carriers (“CLEC”) and state regulators are among those that support the Petition.³

II. INITIAL COMMENTS

A. Overview

Initial comments that oppose TWTC’s Petition raise the following views:

- Market-based solutions are functioning satisfactorily, and, therefore, there is no need for government intervention.⁴
- The Petition seeks to shift inappropriately the cost of converting the transmission protocol of VoIP traffic to TDM for transport and termination on the public switched telecommunications network (“PSTN”) to ILECs.⁵
- The Petition is unlawful because it “would require ILECs to provide access to an ‘unbuilt, superior network,’ which, as the Eighth Circuit has ruled, exceeds the Commission’s authority under section 251(c)(2).”⁶
- Granting the Petition would result in ILECs diverting their investment away from broadband investment.⁷

¹ / Rate Counsel submitted initial comments on August 15, 2011.

² / *See, e.g.*, Opposition of AT&T Inc. (“AT&T”); United States Telecom Association (“USTA”); Verizon and Verizon Wireless (“Verizon”); and Voice on the Net Coalition (“VON Coalition”).

³ / *See, e.g.*, COMPTel; Megapath Inc., PaeTec Holding Corp., RCN Telecom Services, LLC, and TDS Metrocom, LLC (“CLECs”), National Cable & Telecommunications Association (“NCTA”); Public Knowledge; Public Utilities Commission of Ohio (“Ohio Commission”); and YMax Corporation (“YMax”). The Public Service Commission of Wisconsin (“PSCW”) “does not take a specific position on TWTC’s request.” PSCW, at 1.

⁴ / *See, e.g.*, AT&T, at 2-3; VON Coalition, at 7.

⁵ / *See, e.g.*, AT&T, at 2.

⁶ / AT&T, at 2.

- TWTC's VoIP services are information services.⁸

As Rate Counsel's and others' initial comments demonstrate, these arguments in opposition to the Petition are not persuasive. Accordingly, the FCC should grant the Petition. Market-based solutions are not sufficient because ILECs' negotiating power far surpasses that of new entrants. The Petition is lawful, and, indeed, the Act is technology-neutral. The FCC should reject the ILECs' scare tactic regarding broadband investment.

Also, comments diverge as to whether the FCC must classify facilities-based VoIP service as a telecommunications service to affirm TWTC's request that the Commission affirm that the interconnection provisions of section 251 of the Communications Act of 1934, as amended, affords carriers the right to establish IP-to-IP interconnection with an ILEC network and do not require carriers to exchange traffic in time division multiplex ("TDM") format.⁹ Rate Counsel reiterates its recommendation that the FCC classify facilities-based VoIP service as a telecommunications service, regardless of whether such a finding is necessary to grant TWTC's Petition.

B. Contrary to the ILECs' assertions, market-based options are not sufficient.

Initial comments refer to various market-based options purportedly available for VoIP providers to convert their traffic into TDM format including, "Neutral Tandem, HyperCube and others"¹⁰ and also point out that the Internet has evolved with minimal government regulation.¹¹

⁷ / See, e.g., AT&T, at 2.

⁸ / See, e.g., AT&T, at 3-8; VON Coalition, at 1, 3-6.

⁹ / See, e.g., NCTA (asserting that such a classification is not necessary), at 1.

¹⁰ / AT&T, at 3; see also USTA, at 6, footnote 11 (referring also to companies "such as" Neutral Tandem and HyperCube).

¹¹ / USTA, at 5; Verizon, at 1.

However, the evolution of the Internet is irrelevant to the question at hand, namely, the need for government intervention to ensure that incumbents (which possess substantial market power) offer interconnection to new entrants (which lack negotiating power) at reasonable terms and conditions. The presence of two companies (Neutral Tandem and HyperCube) and unspecified “other” companies that offer traffic conversion does not justify the denial of TWTC’s Petition. The goal of the FCC is to further economically efficient local competition, and not to protect lines of businesses that exist simply because ILECs fail to interconnect on reasonable terms.

The “hornet’s nest of intractable regulatory controversies that have roiled the PSTN for the past thirty years”¹² does not in any way justify inaction by the FCC regarding TWTC’s Petition but instead simply underscores the complexity of telecommunications markets and the compelling need for FCC oversight and rulings to ensure that ILECs do not use their market power to discriminate unfairly against their competitors. The PSCW’s concern that commercial arrangements “may not be the most efficient process, perhaps even amounting in some case to an effective barrier to entry” is apt.¹³

ILECs, pointing to the presence of Tandem, HyperCube “and others” that offer IP-to-TDM conversions, also express concern that TWTC’s Petition would undermine these “market-based solutions.”¹⁴ Rate Counsel certainly supports innovative market-based solutions, but ultimately, consumers benefit from efficient interconnection between incumbents and new entrants that do not depend on third parties. Third-party involvement is likely to add to the cost of new entrants’ services, and therefore potentially raises the rates of new entrants’ services.

¹² / AT&T, at 10.

¹³ / PSCW, at 4.

¹⁴ / AT&T, at 11; *see, also* Verizon, at 4-5.

Furthermore, as NCTA explains, “[r]egulation of network interconnection among telecommunications carriers has been a critical foundation for the development of voice competition.”¹⁵ It is disingenuous of ILECs to imply that new entrants can rely on market solutions to yield interconnection agreements that incorporate just and reasonable rates, terms and conditions. The FCC should reject recommendations that would “allow” the transition to IP-to-IP interconnection to be industry-led.¹⁶ Such a path would harm new entrants and consumers because ILECs’ economic incentives diverge from those of their competitors, which seek interconnection.

C. The Petition is lawful because the Act is technology-neutral and because ILECs have already deployed IP-to-TDM technology.

The FCC should reject the argument that the FCC cannot require ILECs to provide IP-to-IP interconnection.¹⁷ The argument is not persuasive because ILECs and their affiliates have been and are continuing to offer IP-based services.¹⁸ The conversion of IP traffic to TDM traffic does not depend on a hypothetical “unbuilt” network, but rather relies on technology that ILECs are already deploying, and therefore relies on technically feasible methods of interconnection.¹⁹ Direct IP-to-IP interconnection ‘is technically feasible and is routinely used.’²⁰ Therefore, the holding of the U.S. Court of Appeals for the Eighth Circuit is irrelevant to TWTC’s Petition.

¹⁵ / NCTA, at 2.

¹⁶ / Verizon, at 8.

¹⁷ / *See, e.g.*, AT&T, at 9-10; USTA, at 3-4; Verizon, at 2, 8-12

¹⁸ / YMax, at 3-4

¹⁹ / COMPTTEL, at 3.

²⁰ / NCTA, at 3.

As the PSCW states, “[t]here can be little question that communications networks are evolving away from the traditional circuit-switched networks to innovative internet protocol (IP) networks.”²¹ Rate Counsel is also not persuaded by arguments that the FCC should deny the Petition because the costs of providing direct IP-to-IP interconnection would be borne by ILECs’ customers while the beneficiary would be TWTC.²² Facilitating efficient interconnection benefits all consumers.

D. ILECs have failed to demonstrate that granting the Petition would thwart the achievement of the Nation’s Broadband Plan.

Rate Counsel urges the Commission to dismiss ILECs’ scare tactic technique of arguing that the granting of TWTC’s Petition would somehow threaten the nation’s achievement of its broadband goals.²³ Contrary to AT&T’s claim,²⁴ an FCC requirement that ILECs accept VoIP traffic in IP format seems unlikely to divert ILEC investment that might otherwise be deployed to broadband networks. Where ILECs perceive broadband investment to be profitable (either based on a cost-benefit analysis of anticipated expenses and revenues associated with such deployment or based on an assessment of public subsidies available for such deployment), ILECs likely will decide to make broadband investment, and where ILECs perceive such investment to be unprofitable, they are unlikely to deploy broadband. Any separate FCC requirement regarding IP traffic should have no bearing on broadband investment decisions.

²¹ / PSCW, at 1.

²² / *See, e.g.*, USTA, at 3-4.

²³ / *See, e.g.*, AT&T, at 11-12; USTA, at 4-6; Verizon, at 5.

²⁴ / AT&T, at 11-12.

Furthermore, as YMax explains, the Commission has identified the migration to all-IP networks and IP interconnection as an explicit regulatory goal.²⁵ Similarly, as the PSCW explains, if the FCC were to determine that IP services such as those that TWTC offers are telecommunications services, such a determination could promote the further development of IP networks.²⁶

E. The FCC should determine unequivocally that TWTC's VoIP services are telecommunications services.

As Rate Counsel explains in its initial comments and as others explain,²⁷ TWTC's VoIP services are clearly telecommunications services (and not information services as various ILECs assert).²⁸ The fact that the calls require a protocol conversion does not alter the fact that VoIP services enable consumers to make and to receive telephone calls over the public switched telephone network.²⁹ ILECs' attempt to split hairs and draw a distinction between legacy TDM-based telephone services and newer IP-based telephone services is not persuasive.³⁰ NCTA asserts that the Commission need not classify VoIP service as a telecommunications service in order to grant TWTC's Petition.³¹ Rate Counsel, however, urges the FCC to resolve the

²⁵ / YMax, at 2, citing Connect America Fund, Notice of Proposed Rulemaking, WC Docket No. 1-90 et al, released February 9, 2011, at paras. 493 and 527.

²⁶ / PSCW, at 2; Public Knowledge, at 1.

²⁷ / Ohio Commission, at 3-4; COMPTTEL, at 6-9.

²⁸ / See, e.g., AT&T, at 3-8; USTA, at 2-3.

²⁹ / Public Knowledge, at 1.

³⁰ / See, e.g., AT&T, at 6-7; Verizon, at 3, at 12-.21

³¹ / NCTA, at 1, 4-5.

ambiguity regarding VoIP classification, and to find that VoIP service is a telecommunication service.³²

TWTC clearly is a telecommunications carrier because it provides telecommunications services, and, therefore Section 251(c)(2) applies, which means that the FCC should grant the Petition.

Rate Counsel reiterates its recommendation that the FCC promote efficient traffic interconnection. If ILECs are permitted to require CLECs to convert voice traffic to the TDM format so that they can hand off traffic to ILECs,³³ ILECs will be able to memorialize network inefficiencies, and, thereby deprive consumers of the benefits of new technologies.

III.CONCLUSION

IP interconnection will benefit consumers as they increasingly turn to IP-based telecommunications services. Rate Counsel recommends that the Commission approve TWTC's Petition in a timely manner for the reasons discussed in its and others' initial comments and in these reply comments.

³² / *See also*, Public Knowledge, at 5-9.

³³ / Petition, at 6-7.

Respectfully submitted,

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